

SUPPORTING DOCUMENT 7

Tri-County Drilling, Inc., Hearing Documents

Opposing the Assessment of Civil Liability

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

<u>IN THE MATTER OF:</u>)	COMPLAINT NO. R9-2002-331
)	
THE CITY OF SAN DIEGO,)	TRI-COUNTY DRILLING,
AMEC EARTH AND ENVIRONMENTAL,)	INC.'S LIST OF WITNESSES
TRI-COUNTY DRILLING, INC.)	AND EVIDENCE
)	
NONCOMPLIANCE WITH)	Date of Hearing: December 11, 2002
CALIFORNIA WATER CODE)	
SECTION 13267)	
_____)	

Tri-County Drilling, Inc., ("TCD") respectfully submits the following list of witnesses and evidence for the December 11, 2002 hearing.

I. WITNESSES

1. **Tim Duddie:** Mr. Duddie is the manager for TCD and he will testify regarding TCD's role in the February 1, 2001 incident. He will testify that TCD was not responsible for locating the borings , obtaining utility markouts, deciding drilling depths, notifying USA Dig Alert or otherwise insuring that the boring location was clear of underground utilities and improvements. He will explain that TCD simply rented out a drill and crew and drilled at the direction of AMEC.

Mr. Duddie will also testify that TCD believed the City would prepare the work plan and preliminary site conceptual model based on the Regional Board's notification that the City had agreed to prepare the work plan and site model.

Mr. Duddie will also testify regarding other factors outlined by Water Code section 13327, which the Board should consider in determining the amount of civil liability.

2. **Mike Ferguson:** Mr. Ferguson was an employee of TCD who was present at the time of the incident. Mr. Ferguson will testify regarding the custom and practice of TCD in drilling at the direction of clients. He will testify that this particular hole was hand augered to five feet pursuant to the standard of care. Mr. Ferguson's testimony is intended to prove that TCD is not culpable in this incident and should not be assessed civil liability.

3. **Peter Garchie or Craig Mann:** Mr. Garchie or Mr. Mann, counsel for TCD, will testify on behalf of TCD regarding the legal analysis of the factual issues described below.

II. FACTUAL ISSUES IN DISPUTE

A. TCD Does Not Have Any Culpability for Incident

TCD drilled at the direction and under the supervision of AMEC. TCD was not responsible for locating the borings, obtaining utility markouts, deciding drilling depths, notifying USA Dig Alert or otherwise insuring that the boring location was clear of underground utilities and improvements. This position is supported by the fact that the Regional Board concluded in its order that the City and AMEC were responsible for the location of the boring and failed to exercise reasonable care in identifying and locating the underground utilities. The Regional Board did not conclude that TCD knew or should have known of the underground pipeline. Nor did the Board find that TCD failed to exercise reasonable care in identifying and locating underground utilities.

The Board relied on the declaration of James Weaver submitted by Chevron, in reaching its conclusion. Mr. Weaver is a registered Geotechnical engineer who identified standard of care

violations by the City, AMEC and TCD. Mr. Weaver's only comment relating to TCD was that the standard of care required the drilling rig operator to hand auger the boring hole in the upper most five feet, either with a manually operated auger, an air knife or water knife to locate underground structures. Mr. Weaver states that hand auguring in this instance would not have resulted in penetration of the Chevron pipeline. Mr. Weaver was apparently not aware that TCD's rig operators did hand auger to five feet with a manually operated auger. Thus, TCD met the standard of care as defined by Mr. Weaver.

There is no evidence of any action or inaction on the part of TCD, which was below the standard of care, that caused the pipeline to rupture. TCD acted appropriately in hand augering and relying on the other parties to insure the boring location was clear of underground pipelines. Therefore, TCD submits that it is not culpable in this incident and respectfully disagrees with the Regional Board's conclusion that it caused or permitted the discharge of fuel waste.

B. TCD Does Not Have Any Culpability for Alleged Failure to Comply with Order

The Regional Board's April 9, 2002 order specifically states, "The intent of the Regional Board was not to require that all three parties submit separate reports." Thus, the Regional Board's order only requires one work plan and one site conceptual model. On **April 26, 2002**, the Regional Board notified TCD that the City had agreed to prepare the work plan and preliminary site conceptual model. Thus, TCD relied on this representation and believed reasonably the City would prepare the work plan and preliminary site conceptual model. Additionally, TCD believed this was reasonable in light of the Board's finding that the City had actual knowledge of the underground pipelines but failed to notify AMEC or TCD of the

pipelines and approved drilling at the site.

Moreover, TCD was not made aware of the fact that the City had not complied with the Order until October 23, 2002, approximately six months after it was advised the City would submit the work plan and model. Thus, TCD is not responsible for the alleged delay in submitting the plans as it was not aware that there had not been compliance.

C. Other § 13327 Factors

TCD is a local company and much smaller than any of the other parties in this case. Any civil liability for an environmental discharge will likely result in an increase in insurance premiums, which are already prohibitive. Thus, such an assessment will have a significant and irreparable effect on TCD's ability to do business as compared to the other parties.

TCD participated in cleanup efforts on the day of the incident and maintained a crew on the site until approximately midnight. TCD has no prior history of violations. Additionally, TCD received no economic benefit from the violation but spent many hours in the clean-up effort. Thus, civil liability should not be assessed against TCD pursuant to §13327.

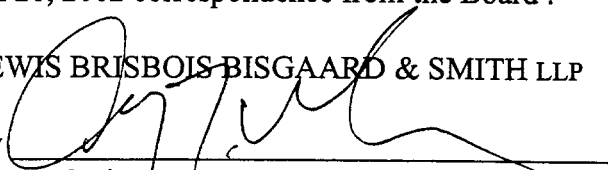
III. DOCUMENTARY EVIDENCE

TCD intends to refer to documents already contained within the Regional Board file. TCD's references will include, but are not limited to the following: November 13, 2001 Directive; April 3, 2002 order; and April 26, 2002 correspondence from the Board .

DATED: November 20, 2002

LEWIS BRISBOIS BISGAARD & SMITH LLP

By


Craig T. Mann

Attorneys for Tri-County Drilling

restrictive forms, higher pricing and are not admitted in California, thus are not protected by the California Insurance Guarantee Association.

- B. I would expect TCD's insurance premiums to increase by at least 50% and I could easily foresee the premiums doubling.
 - C. I would expect that TCD will be required to report this claim for at least five years. Moreover, the trend in the industry is for insurance companies to ask whether the insured has ever had any claims and it is no longer limited to five year period.
 - D. Moreover, depending on the amount paid in defense costs, fines, penalties and/or judgments, I would also expect that TCD's general liability insurance policy will also be affected in a similar manner. That is, TCD will be restricted to surplus lines which are higher priced and more restrictive. Thus, TCD's general liability insurance premiums will also increase 50%-100%.
5. It is my understanding that TCD's profits and continued viability would be significantly impacted by such severe increases in its insurance premiums. It should be noted that such increases would be essentially a repeating penalty against TCD and not a one time liability assessment.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: November 22 2002


NICK ELLIS

IN THE MATTER OF:

THE CITY OF SAN DIEGO,
AMEC EARTH AND ENVIRONMENTAL,
TRI-COUNTY DRILLING, INC.

NONCOMPLIANCE WITH
CALIFORNIA WATER CODE
SECTION 13267

- SD2002:45267.1

4. Prior to drilling any borings, the TCD crew hand augered the boring hole in the uppermost five feet and did not encounter any resistance. It is my opinion as an expert who has testified in many cases, that TCD met the standard of care in excavating the hole and relying on other parties to insure the boring location was clear of underground utilities.
5. It was my understanding based on the April 9, 2002, Order of the Regional Board that only one work plan and one site conceptual model was required to be submitted. On April 26, 2002, I was notified by the Regional Board that the City had agreed to prepare the work plan and preliminary site conceptual model. Thus, I relied on this representation and believed that the City would prepare a work plan and preliminary site conceptual model and did not believe TCD needed to prepare a work plan and preliminary site conceptual model.
6. I was not advised by anyone that the City had not prepared a work plan and site conceptual model until October 2002, six months after I was advised the City would be preparing the work plan and model. Thus, I do not believe TCD is responsible for the delay in submitting the work plan and model.
7. TCD is a local company with limited resources. Any civil liability for environmental discharge will likely result in an increase in our insurance premiums, which are already prohibitive. Thus, such an assessment will have significant and irreparable effect on TCD's ability to do business as compared to

the other parties.

8. TCD has no prior history of violations. Additionally, TCD participated in the clean-up efforts on the day of the incident and maintained a crew on the site until approximately midnight. TCD received no economic benefit from the violation but spent many hours in the cleanup effort.
9. I do not believe TCD should be assessed civil liability in this case, as it was not culpable in the discharge. Moreover, TCD reasonably relied on representations made by the Regional Board and the City that the City would submit a work plan and site model, and TCD was not made aware of any failure to comply with the Order for six months. Thus, TCD is not responsible for the failure to submit a work plan and site model.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: November 20, 2002

TIM DUDDIE

